Arent Fox

September 28, 2009

Ross A. Buntrock
Attorney
202.775.5734 DIRECT
202.857.6395 FAX
buntrock.ross@arentfox.com

VIA ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Ex Parte* Presentation: WC Docket Nos. 07-135 and 09-152

Dear Ms. Dortch:

Great Lakes Communication Corp. ("Petitioner"), through counsel, responds to recent *Ex Parte* letters filed by PAETEC Communications, Inc. ("PAETEC")[1] and Qwest Communications International, Inc. ("Qwest").[2]

The IUB's Proposed Rules for "HVAS" Services Are an *Ultra Vires* Attempt to Regulate Petitioner's Access Rates and Would Directly Conflict with Federal Law

PAETEC correctly notes that the proposed rules for what the IUB terms "High Volume Access Service" ("HVAS") "would prohibit billing for access minutes of use to a HVAS customer." PAETEC *Ex Parte* at 1. Under the IUB's proposal, a LEC could not impose terminating access on an IXC's customer's call to an "HVAS" end user until the LEC and the IXC agreed on a separate rate for this traffic and the LEC has its "HVAS tariff" approved by the IUB. *Id.* As well as being an open invitation for IXC stonewalling, the IUB's proposed rule would reward the IXCs' litigation strategy — *i.e.*, that they can refuse to pay invoices on the ground that they are merely enforcing the terms of the LECs' tariffs. This purported rulemaking is simply another *post hoc* rationalization for the IXCs' unlawful campaign of self-help.

The IXCs' objections to paying their bills, impermissibly validated by the IUB, are all based on LEC access rates. The Commission, however, addressed CLEC access rates in its 2001 *Seventh Report and Order*. In that Order, the Commission struck a compromise. It strictly regulated CLEC access rates to ensure that they were set at reasonable levels, and they deemed those tariffed rates to be conclusively reasonable, to ensure that IXCs could not refuse payment.

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1 Letter from Tamar E. Finn, counsel to PAETEC, to Marlene Dortch, FCC, WC Docket No. 07-135 (September 25, 2009) ("PAETEC *Ex Parte*").

2 Letter from Melissa E. Newman, Vice President, Qwest, to Marlene Dortch, FCC, WC Docket No. 07-135 (September 25, 2009) ("Qwest *Ex Parte*").

In establishing this system, the Commission expressly noted its concerns over IXCs repeatedly using self-help by simply refusing to pay tariffed access charges:

> Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.

Seventh Report and Order, 16 FCC Rcd at 9932, ¶ 23 (citations omitted).

Thus, the Commission has strictly regulated CLEC access rates to ensure that they were set at reasonable levels, and they deemed those tariffed rates to be conclusively reasonable, irrespective of the type of calls involved. Indeed, in *Farmers and Merchants*[3] the Commission found that conference calling companies were end users under Farmers' access tariff based on the same tariff language. The IUB's proposed rules thus create an "outright or actual conflict between federal and state law."[4]

Moreover, the IUB's proposed rule entirely ignores its jurisdictional limitations over certain LECs, codified in section 476.1: "cooperative telephone corporations or associations [and] telephone companies having less than fifteen thousand customers and less than fifteen thousand access lines [*i.e.*, Great Lakes] ... are not subject to the rate regulation provided for in this chapter." Iowa Code Admin § 476.1. Thus, the IUB seeks to do indirectly —hold veto power over LECs' tariffs for a newly invented type of traffic — what they cannot do directly — regulate Petitioner's rates. In sum, the IUB's proposed HVAS rules do nothing more than collaterally attack binding Commission precedent and are *ultra vires* on their face.

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[3] *Qwest Communs. Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, FCC 07-175, 22 FCC Rcd. 17973 (2007).

[4] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986). Petitioner also incorporates by reference its Petition for Declaratory Ruling to the IUB and Contingent Petition for Preemption, filed with the Commission on August 14, 2009, which comprehensively addresses why the IUB's Final Order merits preemption under all of the provisions enunciated in *Louisiana PSC*. *See* Petition at 17-30.

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Qwest's *Ex Parte* Demonstrates Why the Commission Should Preempt the IUB

Qwest's *Ex Parte* in itself demonstrates why Petitioner's Petition is well founded. The letter reveals all of the errors from which Petitioner seeks relief: the extent to which the IUB's Final Order exceeds the IUB's jurisdiction; that the IUB collaterally attacks the *Farmers and Merchants* decision; and contravenes the Commission's prohibition against self-help.

Because this letter cannot capture all of the reasons the IUB's Final Order merits preemption or is otherwise arbitrary and capricious, Petitioner incorporates by reference the Application for Rehearing filed with the IUB on September 25, 2009 (attached hereto as **Exhibit 1**). Petitioner will, however, provide a brief summary of the jurisdictional overreach contained in the Final Order, the IUB's errors of law, and its arbitrary refusal to consider relevant evidence:

- By interpreting the tariff language contained in the Respondent LECs' ***interstate*** tariffs, the IUB exceeded its jurisdiction and simultaneously usurped this Commission's exclusive authority over interstate telecommunications. Application for Rehearing at 3-4.
- The Final Order violates the Interstate Commerce Clause because it effectively prohibits callers outside of Iowa from utilizing the conference calling and chat-line services provided by Petitioner's end user customers. *Id.* at 5-6.
- The foundation of the Final Order is predicated on the IUB's findings regarding the National Exchange Carrier Association (NECA) traffic sensitive pool for ***interstate*** access charges. *Id.* at 6-8.
- The IUB's far-reaching decisions overwhelmingly affect interstate telecommunications, despite the share of intrastate traffic at issue in the proceeding being *de minimis* at best. *Id.* at 9-10.
- The Final Order simply fails to address the arguments and evidence presented by Petitioner, including admissions by Qwest that should have been fatal to Qwest's Complaint. *Id.* at 10-12.
- The IUB simply ignores the Commission's tariff based holdings in the *Farmers and Merchants* decision and proceeds to attack that decision collaterally. *Id.* at 12-13.
- The IUB erred as a matter of law when it found that the Respondents' customers did not subscribe to Respondents' intrastate switched access or local exchange tariffs. *Id.* at 14-15.

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- The IUB erred when it found the Respondents' customers were not end users under their tariffs because an entity that subscribes to the local service of a LEC is an end user when that LEC relies on the definitions of "subscriber" and "end user" in the NECA Access Tariff. *Id.* at 15-16.
- The IUB erred by failing to distinguish those LECs — such as Petitioner — that did not backdate invoices, thereby impugning Petitioner by association. *Id.* at 17-18.
- The IUB completely ignores the evidence presented by all but one Respondent indicating that Respondents' tariffs expressly allow them to provide local exchange service via individual case basis contracts. *Id.* at 18-19.
- The IUB's holding that Respondents' customers were "partners" rather than "end users" — a holding that effectively creates new law in order to justify retroactive refunds — is in direct contravention of a decade's worth of Commission precedent. *Id.* 19-22.
- The IUB's finding that the revenue sharing arrangements at issue in this proceeding were unreasonable conflicts, as noted directly above, with federal law and makes compliance with federal and Iowa law impossible. *Id.* at 22-23.
- The IUB directed the North American Numbering Plan Administrator ("NANPA") to reclaim Great Lakes's numbers — which the Board has no authority to do — for engaging in conduct that is authorized by federal law. *Id.* at 24-26.
- The IUB erred by refusing to apply the definitions of "customer premise equipment" and "premises" contained in Respondents' local exchange tariffs, and further erred by inserting an ownership and control requirement into the Respondents' definition of "end user's premises" in their access tariffs. *Id.* at 27-29.
- The IUB erred when it provided no legal basis for its conclusion that Superior did not provide foreign exchange service and expressly ignored Superior's tariff language that permits it to do so. *Id.* at 30.
- The IUB's order granting retroactive refunds to the IXCs is in direct contravention of its statutory authority and effectively awards the IXCs free terminating access service. *Id.* at 31-33.

Finally with regard to the Qwest *Ex Parte*, it bears mention that Qwest also states that the IUB intends to regulate how end users place long-distance calls to content providers. This decision has serious First Amendment implications, which necessarily requires a federal approach. Indeed, consumers of the content providers' services will have access to the content of their choosing restricted based solely on the content of the speech involved. The functionality of the network used by Petitioner does not distinguish between interstate and intrastate calls, nor does it distinguish calls based on the content of speech. But the IUB seeks to discriminate

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against communications that cannot be jurisdictionally parsed precisely because of their content. The IUB's decision thus underscores the need of the Commission to remind the IUB of its jurisdictional limitations and the concomitant necessity of preempting the Final Order given its undeniable affect on the provision of interstate telecommunications services.

Respectfully submitted,

Ross A. Buntrock

Ross A. Buntrock,
Counsel to Great Lakes Communication Corp.

cc: Chairman Julius Genachowski
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Michael J. Copps
Commissioner Meredith Attwell Baker
Priya Aiyar, Legal Advisor to Chairman Julius Genachowski
Christine Kurth, Legal Advisor to Commissioner McDowell
Carol Simpson, Legal Advisor to Commissioner Clyburn
Jennifer Schneider, Legal Advisor to Commissioner Copps
Christi Shewman, Acting Legal Advisor to Commissioner Baker
Sharon Gillett, Chief, WCB
Donald Stockdale, Deputy Chief, WCB
Julie Veach, Deputy Chief, WCB
Doug Slotten, WCB
Lynne Hewett Engledow, WCB

EXHIBIT 1

TRANSMITTAL

DATE:	September 25, 2009
CASE:	Docket No. FCU-07-02, *IN RE: Qwest Communications Corporation vs. Superior Telephone Cooperative et al.*
SUBJECT MATTER:	**GREAT LAKES COMMUNICATION CORPORATION AND SUPERIOR TELEPHONE COOPERATIVE APPLICATION FOR REHEARING**
COMPANY NAME:	Superior Telephone and Great Lakes
PERSON TO CONTACT:	Thomas G. Fisher Jr. PARRISH KRUIDENIER DUNN BOLES GRIBBLE PARRISH GENTRY & FISHER, L.L.C. 2910 Grand Avenue Des Moines, Iowa 50312 Phone: (515) 284-5737 Fax: (515) 284-1704 E-Mail: tfisher@parrishlaw.com
INITIAL FILING:	No

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

In re: Qwest Communications Corp., Complainant, v. Superior Telephone Cooperative, *et al.*, Respondents.	Docket No. FCU-07-2

GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE APPLICATION FOR REHEARING

Ross A. Buntrock *
Stephanie A. Joyce *
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
202.775.5734
202.857.6000 fax

Admitted *pro hac vice*

September 25, 2009

Thomas G. Fisher Jr.
Parrish Kruidenier Dunn Boles Gribble
Parrish Gentry & Fisher, LLC
2910 Grand Avenue
Des Moines, IA 50312
515.284.5737
515.284.1704 fax

Counsel for Great Lakes Communication Corp. and Superior Telephone Cooperative

Great Lakes Communication Corp. ("Great Lakes") and Superior Telephone Cooperative ("Superior") (collectively, "Applicants"), through counsel and pursuant to 199 IAC § 7.27, hereby respectfully request that this Board rehear and reconsider its Final Order issued in this case on September 21, 2009. The Board committed numerous errors by misreading applicable law and insufficiently considering relevant facts. Applicants previously filed a Motion to Stay Effectiveness of Final Order on September 22, 2009, which is still pending before the Board.

DISCUSSION

Under 199 IAC § 199-7.27(2), Applicants must "specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the alleged grounds of error." An agency errs when its actions are, among other things,

- Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law. Iowa Code Ann. § 7A.19(10)(b);
- Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. Iowa Code Ann. § 7A.19(10)(c);
- Based upon a determination of fact ... that is not supported by substantial evidence in the record ... when that record is viewed as a whole. Iowa Code Ann. § 7A.19(10)(f);
- Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency. Iowa Code Ann. § 7A.19(10)(l);
- Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency. Iowa Code Ann. § 7A.19(10)(m); or

- Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. Iowa Code Ann. § 7A.19(10)(n).

Applicants provide grounds for rehearing as follows.

I. APPLICANTS' GENERAL STATEMENT OF ERRORS AND STATEMENT REGARDING ORDERING CLAUSE NO. 1

OC 1. The FCSCs did not subscribe to the Respondents' intrastate switched access or local exchange tariffs.

(a) The Final Order should be reheard and reconsidered because it conflicts with federal law and surpasses the Board's jurisdiction. The Supremacy Clause, Article VI, Clause 2, of the Constitution, establishes federal law as "the supreme law of the land." "Any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666 (1962), (citing *Gibbons v. Ogden*, 9 Wheat. 1, 210-211 (1824) (C.J. Marshall). "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Id.* With respect to state agency action, "State regulations which contravene the federal regulatory scheme are invalid under the supremacy clause." *Oberschachtsiek v. Iowa Dept. of Social Services*, 298 N.W.2d 302, 304 (Iowa 1980) (citing *Townsend v. Swank*, 404 U.S. 282, 286 (1971)).

In this case, the Board interpreted the language of an interstate tariff, Final Order at 17, which as a matter of law is a document that is within the jurisdiction of the Federal Communications Commission ("FCC") to interpret. 47 U.S.C. § 203. Although the Board ostensibly attempts to restrict its interpretation only to "intrastate application of that language," this is impossible. Final Order at 18. In particular, the Board interpreted the terms "end user," "premises," and "terminate" under NECA Tariff No. 1, an interstate switched access tariff. The Board concluded that conference-calling and chat-line service providers were not "end users" under the interstate tariff, Final Order at 53, and calls to their conference bridges did not "terminate" at their "premises." *Id.* This conclusion conflicts directly with the FCC's interpretation of the identical language in the *Farmers and Merchants* case. *Qwest Communs. Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, FCC 07-175, 22 FCC Rcd. 17973 (2007); *see also* Discussion of Findings of Fact 2, 3, and 10 below.

The Board's encroachment on federal jurisdiction by offering a conflicting interpretation of the NECA interstate access tariff creates an untenable situation. For example, the Board has ordered the reclamation of the telephone numbers assigned to Great Lakes. Finding of Fact 9, Ordering Clause 7. Even if this order were within the Board's jurisdiction to adopt (and it is not, as discussed below), depriving Great Lakes of its telephone numbers would effectively prohibit it from terminating interstate communications to conference-calling and chat-line service providers, which the FCC has declared to be lawful. Similarly, under the Final Order, LECs are effectively prohibited from entering into revenue-sharing arrangements with their customers. The FCC, however, has found that such arrangements do not violate applicable federal law. *See* Item IX below.

Applicants request that the Board to explain how LECs like Great Lakes and Superior can: (1) use telephone numbers for interstate telecommunications when those numbers have been revoked for intrastate telecommunications; (2) terminate interstate telecommunications at a conference-calling bridge without terminating intrastate telecommunications to the identical bridge; (3) enter into lawful revenue-sharing arrangements with conference-calling and chat-line service providers for revenues derived from interstate telecommunications under federal law when the same arrangements are unlawful under state law; and (4) enter into lawful end-user service agreements with conference-calling and chat-line service providers under federal law when the same agreements are unlawful under state law. This list is not meant to be exhaustive, but it clearly illustrates how the Board has created a conflict between federal law and state law, and in this case state law must yield to federal law. *Free*, 369 U.S. at 666. The Board should dismiss the complaint on the grounds that federal law is the supreme law of the land and the Final Order creates an irreconcilable conflict with federal law.

(b) In addition to violating the Supremacy Clause of the Constitution, the Final Order also violates the Interstate Commerce Clause, Article I, Section 8, Clause 3. Under the Interstate Commerce Clause, "states...may enact statutes to protect the...public convenience, concurrent with laws passed by Congress in the exercise of its jurisdiction over the same subjects, provided such laws are local in their character, affect interstate commerce only incidentally or indirectly, and do not conflict with federal legislation or the Federal Constitution." *Powers v. McCullough*, 140 N.W.2d 378, 382 (Iowa 1966). In this case, the Final Order directly conflicts with the Communications Act of 1934, and its affect on interstate commerce is severe. As discussed above, the Final Order will have the effect of prohibiting customers located outside Iowa from placing telephone calls to the customers served by Great Lakes and Superior within Iowa. The local benefits, at the same time, are negligible. The only beneficiaries of the Final Order are extremely large multinational corporations with headquarters far from Iowa. The number of Iowa residents placing calls to the customer served by Great Lakes and Superior are *de minimis*, as evidenced by the small number of intrastate minutes terminated by Great Lakes and Superior. Testimony of Joshua D. Nelson on Behalf of Great Lakes Communications at 9:8-11 (Sept. 15, 2008); Testimony of Tom Mart on Behalf of Superior Telephone Cooperative at 9:8-16 (Sept. 15, 2008) (for the period July 1, 2007 through the present). Without a sufficiently countervailing public benefit to the residents of Iowa, the Board may not burden interstate commerce in the way that it has.

(c) Congress granted the FCC exclusive jurisdiction over interstate and international telecommunications in the Communications Act of 1934. 47 U.S.C. §§ 151-52. The Board in fact has asserted that it "is aware of its jurisdictional limitations with respect to interstate and international traffic and as such has limited its findings in this final order to the intrastate issues raised in QCC's complaint." Final Order at 77. Elsewhere, the Board recognized, in connection with interstate access charges, "that part of this transaction is outside the Board's jurisdiction." Final Order at 57 n.22. In addition, "The Board's jurisdiction over access charges only pertains to intrastate switched access." Final Order at 68. The Board, however, did not limit its findings to only the intrastate issues raised in the complaint. One needs only look three sentences into the Overview to realize how far afield the Board has ventured, and how the entire proceeding has no foundation on the exchange of intrastate traffic: "The scheme *originates* with local exchange carrier (LEC) members of the National Exchange Carrier Association (NECA) traffic sensitive pool *for interstate access charges.*" Final Order at 6 (emphasis added). The "NECA pool" pertains *only* to interstate access charges, yet the functioning of the NECA pool is the predominant focus of the entire decision.

- "*The NECA pool* generally ensures that a LEC will receive a minimum amount of access revenues[.]" *Id.* at 6 (emphasis added).
- "Carriers are allowed to opt-out of *the NECA pool*[.]" *Id.* (emphasis added).
- "After two years, carriers that have opted out of *the NECA pool* must re-enter the pool or be able to support their rates." *Id.* (emphasis added).

- "The LECs bill the IXCs for…traffic using relatively high interstate switched access rates($0.05 to $0.13 per minute) that were filed in individual tariffs after opting out of *the NECA pool*[.]" *Id.* (emphasis added).
- "By opting out of *the NECA pool*, the LECs are able to keep all of the additional revenue for themselves instead of sharing it with other members of the pool. However, if the LECs stay out of *the NECA pool* longer than two years, they have to recalculate their interstate rates based on the actual volumes produced by this traffic pumping scheme[.]" *Id.* at 7 (emphasis added)..
- "QCC explained that most of the Respondents in this case are or were members of *the NECA traffic sensitive pool* for purposes of interstate access charges. *The NECA pool* generally ensures that a LEC will receive a minimum amount of access revenues, but excess access revenues must be shared with other LECs that are also members of the pool.… Carriers are allowed to opt-out of *the NECA pool* for a maximum period of two years and during this time, the carriers may keep all of their access revenues…. After two years, carriers that have opted-out of *the NECA pool* must re-enter the pool or be able show cost support for their rates." *Id.* at 45 (emphasis added).
- "In other situations, the laundering of the toll traffic would allow an ILEC to bypass the access sharing requirements of *the NECA pool* for an additional two years by transitioning access billing to an affiliated LEC." *Id.* at 46 (emphasis added).
- "QCC alleges that Farmers-Riceville, Reasnor, and Superior engaged in traffic laundering by applying their access rates to intrastate toll calls that were

terminated in an exchange of an affiliated LEC for the purpose of increasing access charges to the IXCs or to avoid the access sharing requirements of *the NECA pool* for an additional two years." *Id.* at 47 (emphasis added).

The foundation of Qwest's entire case is so dependent on the operations of the NECA pool — which was a creation of the FCC in 1983, is governed pursuant to Part 69 of the FCC's regulations, and is clearly outside the Board's jurisdiction — that the Board is simply not credible when it claims it "has limited its findings in this final order to the intrastate issues raised in QCC's complaint." Final Order at 77. The Board barely attempts to hide the fact that it is trying to regulate the operations of members of the NECA pool. Indeed, there is ample evidence that the Board does not recognize a distinction between tariffs it can enforce and tariffs it cannot because it repeatedly fails to distinguish between the intrastate ITA Tariff and the interstate NECA tariff.[1] Accordingly, the complaint should be dismissed as beyond the Board's jurisdiction. At a minimum, on reconsideration, the Board must review the evidence in the case and exclude any discussion of the NECA pool or revenues derived from interstate access charges.

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1 "The Respondents argue that *their [intrastate] tariffs* were properly applied to the FCSCs[.]" Final Order at 12. "Public utilities in Iowa, including LECs, are required to comply with the terms and conditions of *their [intrastate] tariffs*, pursuant to the first unnumbered paragraph of Iowa Code § 476.5[.]" *Id.* at 13. "As such, the Respondents are required to comply with the terms and conditions of *their [intrastate] tariffs* as set forth in Iowa Code § 476.5." *Id.* at 14. "Accordingly, the Board finds that the Respondents are public utilities subject to rate regulation, pursuant to § 476.11, and as such are required to comply with the terms and conditions of *their [intrastate] tariffs*, pursuant to § 476.5." *Id.* "The Board also finds that it has the jurisdiction and authority to assess the Respondents' interconnections with the IXCs, pursuant to § 476.11, interpret *their [intrastate] tariffs*, apply the terms of *their [intrastate] tariffs* to the facts in this case[.]"*Id.* at 14-15. "The Respondents contend that these relationships are permitted under *their [intrastate] tariffs* and existing law." *Id.* at 19. "Respondents did not intend to bill the FCSCs for any services under *their [local exchange service] tariffs*, as required in order for intrastate access charges to apply[.]" *Id.* at 25. "Specifically, the Respondents did not comply with the billing requirements of *their [local exchange service] tariffs* when they did not send the FCSCs monthly local exchange invoices[.]"*Id.* at 25. The Board should dismiss the complaint on the grounds that its consideration of the facts and the law were misguided by an over-reliance on the operations of the NECA interstate access tariff. In the alternative, and at a minimum, the Board should reconsider its Final Order and revise it consistent with the editorial revisions identified above.

(d) The Board also erred by basing the entire predicate for the case on evidence irrelevant to the dispute within the Board's jurisdiction. The Board justifies its action on the grounds that the amount of terminating access traffic "dramatically increase[d]," creating "a substantial increase in the long distance traffic to the LEC's numbers, sometimes 100-fold," which amounts to "abnormally high volume of incoming calls." Final Order at 2, 7, 8. Certain LECs "entered into agreements with free conference calling companies that were intended to increase traffic volumes by 10,000 percent or more[.]" *Id.* at 2. The disputed arrangement between the LEC and its customer "creates a substantial increase in the long distance traffic to the LEC's numbers, sometimes 100-fold." *Id.* at 7. "QCC claims that the FCSCs guaranteed a certain volume of traffic to the Respondents, some exceeding one million minutes of traffic per month." *Id.* at 54. "In the year FCSC services were initiated, the Respondent billed QCC for nearly 60 million access minutes, a 100-fold increase in toll traffic." *Id.* at 58. As a result, certain LECs sought "to collect millions of dollars from interexchange carriers[.]" *Id.* at 2. At the heart of this dispute is supposedly a dramatic increase in traffic within the Board's jurisdiction to remedy.

But the traffic within the Board's jurisdiction was *de minimis* at best. In fact, the only credible evidence in the case for the traffic in dispute — traffic originated and terminated within the State of Iowa — proves that Great Lakes and Superior sought to collect $64,248.39 and $16,032.68, respectively, for a total of $80,281.07 from interexchange carriers. Testimony of Joshua D. Nelson on Behalf of Great Lakes Communications at 9:8-11 (Sept. 15, 2008); Testimony of Tom Mart on Behalf of Superior Telephone Cooperative at 9:8-16 (Sept. 15, 2008) (for the period July 1, 2007 through the present). This amount represents less than 5% of the traffic in dispute, clearly demonstrating that the traffic in this dispute is overwhelmingly interstate, and thus within the exclusive jurisdiction of the FCC. There is simply no evidence that intrastate traffic "dramatically increase[d]," "sometimes 100-fold." There never has been sufficient evidence of "a substantial increase in long distance traffic to the LEC's numbers" to justify the radical and far-reaching conclusions in the Final Order. Any evidence related to *interstate* access charges is simply not relevant to the case. Applicants request the Board to reconsider the underlying basis for this case using only *intrastate* traffic volumes, or provide an explanation why limiting the Board's review to intrastate traffic is not appropriate.

(e) In addition, Applicants request that the Board actually consider their arguments and evidence on reconsideration. With limited exceptions, the Final Order ignores Applicants' briefs and evidence, seriously undermining any pretense of impartiality. Indeed, a detached reader of the Final Order would have difficulty ascertaining whether Great Lakes and Superior even participated in the case, given how little the Board acknowledges (either rejecting or accepting) the evidence presented by Great Lakes and Superior, or the legal arguments in support of the evidence. Indeed, the Board simply refers broadly and categorically to the evidence of the "Respondents" and fails to recognize the factual and legal distinctions among them, including the most operative fact—that Great Lakes's intrastate tariff does not mirror the NECA interstate tariff—the only tariff which the Board purported to interpret in its Final Order. This and other arguments were presented by counsel at hearing and fully briefed by Great Lakes and Superior, yet ignored by the Board. An agency acts arbitrarily and capriciously when it chooses to ignore substantial evidence or fails to address a party's legal arguments. *See MCI Telecomms. Corp. v. FCC*, 842 F.2d 1296, 1303-04 (D.C. Cir. 1988) (emphasizing the "irrationality of the FCC's approach" because of its failure to gather and consider relevant information, its reliance on unsupported assumptions, and its incoherent analysis); *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d

655, 658 (D.C. Cir. 1994) (finding agency's "piecemeal picking and choosing" of relevant criteria and its uneven application of those criteria "is the very sort of arbitrariness and capriciousness" a court is empowered to correct); *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 707 (Iowa 2007) (agency action is arbitrary and capricious if decision is made without regard to law or facts of case); *see also Citizens' Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815, 819 (Iowa 1990) (agency action is unreasonable if it acts "in the face of evidence as to which there is no room for difference of opinion ... or not based on substantial evidence) (citations omitted);.

With the exceptions of Great Lakes's certification status and Superior's foreign exchange service, the Board did not address any of the arguments raised by Applicants in their briefs. While an exhaustive litany of the issues and evidence that the Board refused to consider in the Final Order is outside the scope of this Application, particularly troubling is the Board's failure to acknowledge the following:

- Ms. Eckert's written testimony concedes that Applicants' customers "get local exchange service." Direct Testimony of Lisa Hensley-Eckert at 23 (Mar. 17, 2008).
- According to Qwest's own statements, an entity that obtains service under a local tariff is an end user. Direct Testimony of Jeffrey D. Owens at 62:7-10 (Mar. 17, 2008).
- Great Lakes' local service tariff states, on the first page, "Nothing in this tariff shall restrict the company's right to offer line or services to governmental and business entities by special contract." Great Lakes Commc'ns Corp. Telephone Tariff, Sheet 1.
- "The maximum allowable access charges per telephone line are set by the FCC, but local telephone companies are free to charge less or nothing at all." *See* Ex. 708.

This evidence and the admissions by Qwest above are alone fatal to Qwest's case. Yet the Board did not even tangentially acknowledge Applicants' evidence or arguments, despite spending 81 pages to grant Qwest the relief it sought, *i.e.*, free access service. Indeed, the Board took only two paragraphs to consider Respondents' argument as it relates to the ICB agreements at issue in this proceeding. Final Order at 30. But even here the Board focused solely on Aventure's outlying tariff language and did not give any consideration to the other seven LECs' tariff language. This "piecemeal picking and choosing" cannot withstand appellate scrutiny. *Tel. & Data Sys.*, 19 F.3d at 658.

Accordingly, the Board has failed to consider substantial evidence in the record. Applicants thus request the Board to reconsider the case, but this time by including the evidence presented by Great Lakes and Superior.

(f) The Board also erred by claiming that there has been no final ruling in the *Farmers and Merchants* proceeding. Final Order at 29. Federal statute 47 U.S.C. § 405 requires that the FCC resolve any substantive reconsideration of a tariff dispute within 90 days:

> Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

Id.

Section 204(a) regards tariff changes: "any new or revised charge, classification, regulation, or practice." *Id.* § 204(a). Section 208(b) regards tariff investigations: "any investigation under this section of the lawfulness of a charge, classification, regulation, or practice." *Id.* § 208(b). Qwest's action against Farmers and Merchants occurred under Section 208(b), and thus if the FCC were inclined to change its substantive decision in that case, the 90-day deadline would have to be met.

It has been, however, over a year since the FCC ordered Farmers to produce additional discovery and allowed Qwest to file a supplemental petition for reconsideration in May 2008. Thus, if the FCC were intending to overturn its prior decision, Section 405 required it to do so in

August 2008. No order has issued. Plainly the FCC does not intend to reverse its ruling, but rather is possibly addressing the "questions raised about the integrity of our process." *Farmers and Merchants Reconsideration Order*, 23 FCC Rcd. at 1619 ¶ 11. Spoliation is the issue now under consideration, not whether an entity that "enter[s] one's name for service" to a LEC is an "end user." *Farmers and Merchants Order*, 22 FCC Rcd. at 17987 ¶ 38.

Based on this erroneous legal conclusion, the Board proceeds to attack the Farmers and Merchants decision collaterally. As the U.S. Court of Appeals for the Eighth Circuit has stated, "No collateral attacks on the FCC Order are permitted." *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004) (affirming injunction against agency on grounds of preemption). Moreover, "Congress delegated authority to the FCC to create uniform rules for telecommunications, which, by its very nature, requires consistency amongst the states." *Bennett v. T-Mobile USA, Inc.*, Case No. CV 08-4943 (RSWL), 2008 WL 5622710, *3 (C.D. Cal. Dec. 22, 2008) (dismissing case). Thus, to collaterally challenge the FCC's regulations and a party's conformity therewith would "unquestionably trample[ ] upon the FCC's authority." *Id.*

For all of the foregoing reasons, the Board created an irreconcilable conflict with federal law, predicated its entire case on the exchange of traffic outside its jurisdiction, failed to consider relevant evidence regarding the exchange of traffic within its jurisdiction, failed to consider evidence and legal arguments of Great Lakes and Superior, and misinterpreted applicable and binding federal law. Accordingly, the Board should vacate its Final Order and dismiss the Qwest Complaint.

II. **REGARDING FINDING OF FACT NO. 1**

FF 1. The FCSCs did not subscribe to the Respondents' intrastate switched access or local exchange tariffs.

The Board erred because the FCC held in *Farmers and Merchants* that conference call companies subscribe to the services of the LECs by "enter[ing] their names for . . . tariffed services" under the NECA Tariff. 22 FCC Rcd. at 17988 ¶ 39. The FCC also expressly and unequivocally rejected that argument that the act of subscribing "requires the payment of money." 22 FCC Rcd. at 17988 ¶ 37. As such, calls placed to conference call companies are compensable for terminating access, whether or not the conference call company has made a net payment to the LEC. 22 FCC Rcd. at 17988 ¶ 39.

Both Great Lakes and Superior have adopted these NECA definitions in their tariffs. Testimony of Joshua D. Nelson on Behalf of Great Lakes Communications at 6:20-7:2 (Sept. 15, 2008); Testimony of Tom Mart on Behalf of Superior Telephone Cooperative at 3:7-12 (Sept. 15, 2008) (for the period July 1, 2007 through the present); Testimony of Lawrence J. Chu at 33:15-19 (Superior), 43:12-16 (Great Lakes). For the period that Superior had opted out of the NECA access pool (July 1, 2006 through June 30, 2007), its tariff used a definition of "end user" that is materially similar to the NECA definition: "[a]ny individual ... which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users." Chu Testimony at 33:15-19. The operative phrase "subscribes to" mirrors the NECA definition of "customer" on which the FCC relied. 22 FCC Rcd. at 17987 ¶ 36.

Accordingly, the Board's Final Order, which rests on a conclusion that the act of subscribing for a service is not completed until the customer pays the LEC's invoice, Final Order at 24, is fundamentally flawed and stands in direct contradiction to the FCC's holding in *Farmers and Merchants*. Indeed, under the Board's logic in the Final Order, "customers" could simply refuse to ever start paying for the services provided by LECs and thereby avoid subscribing for the services. It would follow, therefore, that LECs would have to ensure that their customers were going to pay invoices before the LECs were entitled to bill the IXCs for originating and terminating access charges. Aside from contradicting the FCC's findings, he Board's position is unsustainable in theory and in practice. The Board should revise its order to comport with federal law and conclude that the conference call providers subscribe to the services at issue.

III. <u>REGARDING FINDING OF FACT NO. 2</u>

FF 2. FCSCs are not end users as defined by the Respondents' tariffs.

The Board erred because the FCC held in *Farmers and Merchants* that conference call companies are end users of LECs. As such, calls placed to conference call companies are compensable for terminating access. 22 FCC Rcd. at 17988 ¶ 39. The FCC's analysis is that under the NECA tariff, to which Farmers and Merchants adopted, an "end user" is "'any customer of an interstate or foreign telecommunications service that is not a carrier.'" 22 FCC Rcd. at 17987 ¶ 36 (quoting NECA Tariff § 2.6). A "customer" is defined in the NECA tariff as "any entity 'which subscribes to the services offered under this tariff." *Id.* Thus, for any LEC that has adopted the NECA definitions of "end user" and "customer," a conference call provider is deemed an end user for purposes of assessing terminating access.

The Board erred by misinterpreting applicable federal law regarding access charges for calls to conference-calling and chat-line service providers. According to the FCC, an entity that subscribes to the local service of a LEC is an end user when that LEC relies on the definitions of "subscriber" and "end user" in the NECA Access Tariff No. 5. *Farmers and Merchants Order*, 22 FCC at 17987 ¶ 38. Great Lakes and Superior rely on those same definitions, and their conference-calling and chat-line service providers plainly became end users and subscribers when they agreed to take local exchange service from Great Lakes and Superior. The Board's incorrect interpretation of the NECA Tariff in the Final Order thus hinges absolutely on distinguishing the *Farmers and Merchants* Order from the facts in this case. The Board simply misinterpreted the *Farmers and Merchants* Order.

Both Great Lakes and Superior have the same factual predicate as the one analyzed and relied upon by the FCC in the *Farmers and Merchants* case: the conference call providers are the "end users" of Farmers and Merchants. It perforce follows that the customers that Great Lakes and Superior serve are "end users" as a matter of law. Accordingly, the terminating access service that Qwest and Sprint concededly used falls well within the LECs' access tariffs and is compensable. Because the Final Order creates a direct conflict with federal law regarding the interpretation of the NECA interstate access tariff, state law must yield to federal law. *Free v. Bland*, 369 U.S. at 666.

IV. **REGARDING FINDING OF FACT NO. 3**

FF 3. The Respondents did not net, or offset, fees to the FCSCs.

The Board erred in finding that the Respondent did not net, or offset, fees to the FCSCs. In analyzing the same tariff interpreted by the Board, the FCC held in *Farmers and Merchants* that conference call companies subscribe to and are end users of the services provided by the LECs. 22 FCC Rcd. at 17988 ¶ 35-39. The FCC also expressly and unequivocally rejected that argument that the "conference calling companies can be end users under the tariff only if they made net payments…." 22 FCC Rcd. at 17988 ¶ 38. Indeed, the FCC found that the "question of whether the conference calling companies paid Farmers more than Farmers paid them is thus *irrelevant* to their status as end users" and the LECs are able to "charge terminating access charges for call terminated to the conference calling companies." *Id.* Accordingly, conclusions regarding the netting and offsetting are *irrelevant* to determining whether or not access charges are due and it should be removed from the revised order.

V. REGARDING FINDING OF FACT NO. 4

FF 4. Certain Respondents improperly backdated bills and contract amendments to misrepresent transactions with the FCSCs.

The Board erred by failing to identify the LECs that purportedly engaged in "backdating" invoices, thereby impugning by association those LECs, like Great Lakes and Superior, that did not engage in the practice. The Board relies heavily on its conclusion that the practice of "backdating" invoices undermines the credibility of certain LEC Respondents, yet does not refer to any particular LECs . *See, e.g.*, Final Order at 22 (unspecified "Respondents assert that the backdating of bills is a normal business Practice"); *id.* at 29-30 ("Board views this practice as an attempt by the four [unidentified] Respondents engaging in backdating to manufacture evidence, after the fact, to make the transaction look like something that was not contemplated by the Respondents or the FCSCs when they first entered into these arrangements. The effort reflects badly on those Respondents and the credibility of their cases."). Then, despite impugning the credibility of those that engaged in backdating, the Board fails repeatedly to make clear which LEC Respondents committed backdating, and which LEC Respondents did not, thereby demonstrating no regard for maintaining the credibility of those LEC Respondents that did not engage in the practice. The Board has no reason to doubt the credibility of Great Lakes and Superior.

The record is clear: <u>Great Lakes and Superior did not backdate any invoices or "manufacture evidence" in this case.</u> Post-Hearing Brief of Great Lakes Communications Corporation and Superior Telephone Cooperative (March 31, 2009) ("Great Lakes/Superior Br.") at 9; Post-Hearing Reply Brief of Great Lakes Communications Corporation and Superior Telephone Cooperative (April 30, 2009) ("Great Lakes/Superior Reply Br.") at 4. Qwest agrees that neither of these companies can be accused of that conduct. Tr. At 578:18-23 (Owens). The Board is obligated to correct the Final Order to reflect this undisputed fact. As the Board is no doubt aware, its voice as a regulatory body of the state carries weight and the consequences of its accusation are significant. Applicants request the Board revise the Final Order to make clear that Great Lakes and Superior did not backdate invoices or manufacture evidence.

VI. REGARDING FINDING OF FACT NO. 5

FF 5. The Respondents did not provide local exchange service to FCSCs through special contract arrangements.

The Board found that the "Respondents did not provide local exchange service to FCSCs through special contract arrangements" and on that basis held that the conference calling companies did not subscribe to a local exchange service. The Board did so by ignoring nearly all of the record evidence regarding the tariff provisions of both Great Lakes and Superior that expressly allow these LECs to provide local exchange service through ICB contracts with their customers. Great Lakes/Superior Br. at 37; Great Lakes/Superior Reply Br. at 16-17, 26-27. Indeed, in the 81 pages of the Final Order, the Board devotes *two* paragraphs to *Aventure's* ICB provision in its *interstate* access tariff. Final Order at 30. As the Board is aware, seven other LECs were parties to this proceeding, which "specifically pertains to whether IXCs must pay switched access charges on *intrastate* toll traffic." *Id.* at 37 (emphasis added). An agency acts arbitrarily and capriciously when it chooses to ignore substantial evidence. *See Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 707 (Iowa 2007) (agency action is arbitrary and capricious if decision is made without regard to law or facts of case); *see also Citizens' Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815, 819 (Iowa 1990) (agency action is unreasonable if it acts "in the face of evidence as to which there is no room for difference of opinion ... or not based on substantial evidence) (citations omitted); *MCI Telecomms. Corp. v. FCC*, 842 F.2d 1296, 1303-04 (D.C. Cir.

1988); *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 655, 658 (D.C. Cir. 1994) (finding agency's "piecemeal picking and choosing" of relevant criteria and its uneven application of those criteria "is the very sort of arbitrariness and capriciousness" a court is empowered to correct).

If the Board had considered the relevant evidence, it would have been compelled to conclude, for example, that Great Lakes's local service tariff states, "Nothing in this tariff shall restrict the company's right to offer lines or services to governmental and business entities by special contract." Exhibit 1363; *see also* Great Lakes/Superior Br. at 37; Great Lakes/Superior Reply Br. at 16-17, 26-27. The Supreme Court reiterated as recently as 1998 that, despite what some might regard as "harsh" or "unfair" consequences, the terms of a valid tariff "cannot be varied or enlarged by either contract or tort of the carrier." *AT&T Corp. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (reaffirming the doctrine in the telecommunications context).

The Board should have examined Great Lakes' and Superior's relevant tariff language, such as Great Lakes's ICB provision above, and determined that nothing in their tariffs prevented them from offering end users local exchange service pursuant to special contract arrangements. Indeed, the clear language of Great Lakes's tariff — which "cannot be varied or enlarged" by the Board — expressly allows for such arrangements. *Id.* The Board should have found that such language is binding on Qwest and the other IXCs. The Board's failure to so find was clearly erroneous, and its failure to even consider this evidence was arbitrary and capricious.

VII. <u>REGARDING FINDING OF FACT NO. 6</u>

FF 6. The Respondents and FCSCs acted as business partners.

The Board erred when it found that the LECs' conference calling companies were partners rather than end users. More fundamentally, however, even if the Board were correct in its characterization of these companies as the Respondents' "partners," it was arbitrary and capricious for the Board to fail to articulate any rationale basis for its apparent holding that "partner" and "end user" are mutually exclusive designations.

Iowa law is clear that the "elements necessary to establish the existence of a partnership are a sharing of profits and losses of a business, joint control, and intent." *Horace Mann Ins. Co. v. Combs*, 626 F. Supp. 354, 356 (S.D. Iowa 1986). The Board attempts to overcome these requirements by sleight of hand: "[i]f a LEC was not paid by the IXC for terminating calls to an FCSC, that LEC would not recover its costs of terminating those calls and the LEC and FCSC would experience a loss of profit. Because the FCSCs contracted to share the profits and the losses with the Respondents, this arrangement satisfies the Respondents' definition of 'partnership'...." Final Order at 33. First, a "loss of profit," is only a reduction in profit, not a "loss" in any legal or accounting sense. The former is a decrease in a positive number; the latter is a negative number. Moreover, even if there were losses as a result of a decrease in revenues from a particular line of business (conference call terminating access charges), there is no record evidence to conclude that the LECs and conference call providers had agreed to share profits and losses "of a business," as both entities have other revenue streams not affected by their contracts. But further, there was never a showing or finding of "joint control" or "intent." Indeed, the Board finds elsewhere that the Respondents' customers had *no* control over the premises in which their equipment was located. Final Order at 39. Thus, far from satisfying Respondents' definition of "partnership" — which was the legal definition — the Board simply adopted the nebulous concept Qwest created in order to justify its refusal to pay for the terminating access services Respondents provided. As such, there was no record evidence to support the Board's finding of partnership and the Board's internal contradictions are ultimately self-defeating on this point. Even Qwest disclaimed that the LECs and their conference provider customers were legally partners. Tr. 1116:9-23. The Board's finding to the contrary was clearly erroneous.

Even ignoring the Board's mistaken legal conclusion, it has failed to articulate why the LECs' alleged "partnership" with the conference calling companies is in any way relevant to the question of whether access charges are owed under the LECs' intrastate access tariffs in light of numerous FCC decisions to the contrary. This failure to explicate why "partner" and "end user" are mutually exclusive propositions — which amounts to a new rule, albeit one applied retroactively — was arbitrary and capricious. Indeed, the Final Order simply ignores or fails to distinguish several dispositive decisions in which the FCC rejected the same hyperbolic IXC protestations about indistinguishable revenue-sharing arrangements that LECs entered into with their largest end user customers.[2] Indeed, the FCC answered the specific question of the status of conference-call service-provider business partners as end users under the NECA tariff unequivocally: "We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' [NECA interstate access] tariff." *Farmers and Merchants*, ¶ 38. It is simply inexplicable for the Board to rule otherwise.

As Respondents have previously reminded the Board, "[n]o collateral attacks on [an] FCC Order are permitted." *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004). Rather, to challenge collaterally the FCC's regulations and a party's

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2 *See AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130, 16132 ¶ 5 (2001) ("Jefferson would make payment to [its end user] based on the amount of access revenues that Jefferson received for terminating calls."); *See also AT&T Corp. v. Frontier Commcn's of Mt. Pulaski, Inc.*, 17 FCC Rcd. 4041-42, ¶¶ 1, 2 (2002) (same); *AT&T v. Beehive Tel. Co.*, 17 FCC Rcd. 11641 (2002) (same); *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel, Co.*, Memorandum Opinion and Order, 22 FCC Rcd. 17973, 17987 ¶ 38 (2007); *Access Charge Reform and Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eight Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, 9143 ¶ 70 (2004) ("We are not convinced that the commission arrangements that competitive LECs may have entered into with 8YY [*i.e.*, toll-free calls] generators necessarily affect the level of traffic that these customers, typically universities and hotels, generate."

conformity therewith would "unquestionably trample[ ] upon the FCC's authority." *Bennett v. T-Mobile USA, Inc.*, Case No. CV 08-4943 (RSWL), 2008 WL 5622710, *3 (C.D. Cal. Dec. 22, 2008. The Board is thus without authority to change the rules in the middle of the game and punish Respondents for their conformity with the FCC's regulations and nearly a decades' worth of precedent.

VIII. REGARDING FINDING OF FACT NO. 7

FF 7. The filed tariff doctrine does not apply to the Respondents in this case.

Flowing from the Board's initial error in finding that the conference call providers are not end users that have subscribed to the LEC's tariffed services, *see* Sections I-III, supra, the Board further erred by finding that the filed rate doctrine does not apply in this case. Accordingly, the Board should eliminate Finding of Fact No. 7 when it issues its new order. The behavior of the parties and FCC precedent both demonstrate unequivocally that the traffic bound for the conference call providers is and was governed by the LEC tariffs. Accordingly, the filed tariff doctrine applies.

IX. REGARDING FINDING OF FACT NO. 8

FF 8. The sharing of revenues between Respondents and FCSCs is not inherently unreasonable, but may be an indication that a particular service arrangement is unreasonable.

The Board erred when it ruled that, under the facts presented in this case, revenue sharing between a carrier and a customer is unreasonable. Final Order at 58-59. The Board's reasoning is fatally flawed because it relies on a legal conclusion that the FCC has already found to be lawful. The Board says "the carrier has substantial market power, even monopoly power, over [terminating access] services[.]" *Id.* The FCC already considered this issue and ruled that, while all LECs control a bottleneck facility to their end users, that control is not unlawful, and charging the tariffed rate of the local ILEC, which necessarily includes the NECA access tariff rate, is just and reasonable. *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶¶ 30, 41 (2001) ("*Seventh Report and Order*"). Thus, for the Board to have held that revenue sharing is unreasonable when the LEC has "monopoly power" is tantamount to abolishing all revenue sharing of all access revenue. This holding directly contravenes the FCC's several rulings to the contrary. As a matter of federal law, sharing access revenue is not unreasonable, unjust, or unlawful in any way.

In addition, effectively abolishing revenue-sharing between a LEC and a customer under the circumstances of this case also creates a conflict with federal law in violation of the Supremacy Clause. The Final Order makes clear that revenue-sharing between a LEC and a customer that generates a high-volume of inbound traffic is unreasonable. Final Order at 58-59. This conclusion conflicts directly with the conclusion of the FCC under almost identical circumstances. In a string of cases, the FCC has rejected IXC arguments that revenue-sharing is an unjust or unreasonable practice. *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001); *AT&T Corp. v. Frontier Commcn's of Mt. Pulaski, Inc.*, 17 FCC Rcd. 1041 (2002); *AT&T v. Beehive Tel. Co.*, 17 FCC Rcd. 11641 (2002). Most recently in the *Farmers and Merchants* case, the FCC determined that "Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff. . . . The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users."[3] Again, because state law creates a direct conflict with federal law, state law must yield. *Free v. Bland*, 369 U.S. at 666.

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[3] *Id.* at 17987, ¶ 38.

X. <u>REGARDING FINDING OF FACT NO. 9 AND ORDERING CLAUSES NO. 4 AND 7</u>

FF 9. At least one Respondent has improperly assigned all of its telephone numbers to FCSCs, which are not end users.

OC 4. All of the Respondents, with the exception of Great Lakes, are directed to file reports with the Board within ten days of the date of this order stating whether they have any telephone numbering blocks that are not assigned to end users and state how many non-FCSC end users currently have numbers out of each telephone numbering block.

OC 7. The North American Numbering Plan Administrator and the Pooling Administrator are directed to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes Communications Corp.

The Board erred by directing the "North American Numbering Plan Administrator and the Pooling Administrator . . . to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes Communications Corp." Final Order, Ordering Clause ¶ 7. This directive clearly exceeds the delegated authority available to the Board and directly contradicts applicable federal law.

As a threshold matter, there appears to be significant conflict between the Board's action and the directive of the FCC in the *Numbering Resource Optimization*, Third Report and Order and Second Order on Reconsideration, CC Docket No. 96-262 and CC Docket No. 99-200, 17 FCC Rcd. 252, 295 ¶ 97 (2001). Specifically, in the Third Report and Order, the FCC concluded as follows:

> We further conclude that, to invoice this additional remedy, *only the Commission*, specifically the Common Carrier Bureau and the Enforcement Bureau, *shall direct the NANPA or National Pooling Administrator to withhold numbering resources* from carriers for audit-related violation. *We decline, at this time, to delegate authority to state commissions* or the NANPA to determine when a carrier shall be liable under this provision, primarily to ensure that this remedy is invoked uniformly.

Id.

The Board, nevertheless, relies upon what it believes to be a delegation of authority from the FCC to order reclamation of numbers. The extent of that delegated authority, however, is limited to circumstances when there is a clear and unquestionable showing that numbers have not been activated in a timely manner: "State commissions may investigate and determine whether service providers *have activated their numbering resources* ... ." 47 C.F.R. § 52.15(i)(2) (emphasis added). The FCC also directed that NANPA abide by this state commission's determination to reclaim an NXX code only "if the state commission is satisfied that the service provider has not activated and commenced assignment to end users of their numbering resources within six months of receipt." *Id.* 47 C.F.R. § 52.15(i)(5).

Therefore, the Board erred when it determined that it could order reclamation of every NXX code assigned to Great Lakes purely because it had determined that conference call customers are not "end users" for purposes of state law. The Board's Order fails to find that Great Lake's never *activated* its numbers, a threshold determination that must be made before reclamation may be commenced. Further, even if the Board had alleged that Great Lakes had not activated numbers, the Board failed to meet the requirement to "provide service providers an opportunity to explain the circumstances causing the delay in activating and commencement assignment of their numbering resources prior to initiating reclamation." 47 C.F.R. § 52.15(i)(4).

What is equally erroneous is that the Board's decision rests on a determination that conference call and chat-line providers are not "end users," despite the fact that the FCC has determined in *Farmers and Merchants* that conference call providers are, in fact, end users for purposes of federal law. As such, though the Board can only claim to have authority to render interpretations regarding the status of conference call customers as end users for purposes of state law, it has nevertheless concluded that Great Lakes has never served any end user under either state *or federal* law. The Board must defer to the FCC's determination that conference call customers are "end users," and, as such, Great Lakes (and the other LECs) activated its numbering resources by assigning numbers to the conference call service providers. The Board is without authority to direct the NANPA to begin reclamation of numbers assigned by Great Lakes to its "end user" conference call providers. Indeed, it bears noting that the effect of the Board's order would be to preclude Great Lakes *in its entirety* from providing any telecommunications service, whether intrastate or interstate. The illegality of the Board's action in this regard is, therefore, clear. *See also* 47 U.S.C. § 253; 47 C.F.R. § 52.9.

The ability to obtain numbers is, according to the FCC, a crucible for fostering a competitive marketplace. "Under no circumstances should consumers be precluded from receiving telecommunications services of their choice from providers of their choice for a want of numbering resources. For consumers to benefit from the competition envisioned by the 1996 Act, it is imperative that competitors in the telecommunications marketplace face as few barriers to entry as possible." *Numbering Resource Optimization*, Second Report and Order on Reconsideration, 16 FCC Rcd. 306, 334 ¶ 60-61 ("*Second Number Resource Optimization Order*"). Stripping Great Lakes of its numbers via *ultra vires* action, as the Board attempts to do in the Final Order, flouts this federal mandate. For these reasons, the Board should also eliminate Ordering Clause No. 4. There is no need for Great Lakes or other LECs to distinguish between telephone numbers assigned to conference call customers regarding Finding of Fact No. 9.

XI. REGARDING FINDING OF FACT NO. 10

FF 10. The intrastate toll traffic did not terminate at the end user's premises.

The Board erred by refusing to apply the definitions of "customer premise equipment" and "premises" contained in Respondents' local exchange tariffs, which governs the relationship between LECs and their local exchange customers. A tariff is the law, and the IXCs are bound by these definitions. It was arbitrary and reversible error to apply the wrong law. The Board further erred when it unilaterally inserted into Respondents' access tariffs a definition of "end user's premises" that "*generally* denotes a building or buildings that is owned, leased, or otherwise controlled by the end user." Final Order at 38. It was arbitrary and capricious for the Board to apply this newly crafted definition to justify retroactive refunds of access charges.

The Board makes the assertion that "the terms of the switched access tariffs govern and the terms and conditions from the Respondents' local exchange tariffs are not directly applicable in this case." Final Order at 37. This conclusion cannot be reconciled with the Board's assertion that "[c]alls must be delivered to an end user of the LEC's [*sic*] local exchange tariffs." *Id.* at 35. The Board therefore has reviewed the wrong tariff to the question of what is a "premises." Because tariffs have the force of law, the Board thus has committed reversible error by applying the wrong law to an issue. Iowa Code Ann. § 7A.19(c)(l).

The tariff that *does* govern the relationship between the LECs and their end user customers — and thus is the tariff that supplies the definitional requirements of "end user's premises" — is the LECs' local exchange tariff. It is a commonsense notion that only IXCs needing access to a LEC's network purchase *access* services out of a LEC's *access* tariffs. The Board did not, and cannot, explain why the LEC's *local exchange* end user customers — whether it be Mrs. Smith, Mr. Jones or a conference calling company — who have already contracted for local exchange service would need to purchase access to an exchange within which they are already located. Thus, if the relationship between the LECs and their conference calling customers satisfies the definitions within the local exchange tariff, Qwest and the other IXCs are bound thereby. Under Respondents' local exchange tariffs, an end user must simply *occupy* space in *a* building in order to satisfy the definitional requirement of "premises." *Id.* at 36. The conference calling companies unquestionably satisfy this definition and it was clear error for the Board to apply the wrong tariff language to the facts of this case.

But even Respondents' access tariffs contain no indicia of the ownership or control "requirements" that the Board held must be satisfied. "Premises" is simply defined as "a building or buildings on contiguous property...." *Id.* To graft onto this definition Qwest's *business* decision to charge for space and power as a *legal* requirement for the Respondents to satisfy goes too far. The Board merely assumes what it is trying to prove and inserts an ownership or control requirement that appears nowhere in Respondents' tariffs. Instead of reading Respondents' local exchange tariffs and access tariffs in harmony, the Board arbitrarily adopted the "law" Qwest itself drafted in order to excuse its decision to stop paying its bills.

The Board's finding also ignores the controlling FCC precedent Respondents raised at the hearing and in their briefs. In the *Local Competition Order*,[4] the Commission noted that *ILECs* were required to charge for physical collocation in their central offices, but even this requirement did not apply to carriers or end users under virtual collocation arrangements, by which these interconnectors had "no right to enter the LEC central office." *Local Competition Order*, 11 FCC Rcd. at 15784-85 ¶ 559. But these regulations concerning ILEC collocation provisioning were never extended to CLECs. The Commission made this clear in the *Seventh Report and Order* when it stated "we continue to *abstain entirely* from regulating the market in which end-

[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499 (1996) ("*Local Competition Order*").

user customers purchase access service." *Seventh Report and Order*, 16 FCC Rcd. 9938, ¶ 39 (emphasis added). The Board's failure to address this authority raised by Respondents, and instead to simply create an *ex post facto* ownership or control requirement, was arbitrary and capricious.

Applicants thus request the Board to reconsider Section I.A.2 of the Final Order, and to apply the definition of "premises" from the respective local exchange tariffs of Great Lakes and Superior, or in the alternative, to apply the definition of "premises" from the NECA Tariff. Alternatively, Applicants ask the Board to explain why neither tariff definition is applicable in the circumstances, and under what authority the Board may manufacture a new definition of a term already defined in a tariff.

XII. <u>REGARDING FINDING OF FACT NO. 11</u>

FF 11. The intrastate toll traffic, including international, calling card, and prerecorded playback calls, did not terminate within the Respondents' certificated local exchange areas and were not subject to intrastate terminating access charges.

The Board erred by ruling that international, calling card, and prerecorded playback calls did not terminate within Applicants' certificated local exchange areas. Calls to the international calling service served by Great Lakes terminated at the service providers' equipment and resulted in compensable terminating access; the conversion within the equipment to a VoIP-based call is a separate and distinct call for which no carrier ever was charged originating or terminating access. Great Lakes/Superior Reply Br. at 11; Tr. 2622:3-23. With respect to the certificate of Great Lakes to provide service in Spencer, see Section XVII, *infra*.

XIII. REGARDING FINDING OF FACT NO. 12

FF 12. Some Respondents engaged in traffic laundering by billing the terminating access rates of one LEC for calls that terminated in a different LEC's exchange.

The Board erred when it concluded that the arrangement between Great Lakes and Superior was not a foreign-exchange arrangement. The Board based its conclusion on the fact that there are no facilities linking the Superior network directly to the Great Lakes network. Final Order at 48. Yet the Board provided no legal foundation for the conclusion that such facilities are necessary before a foreign-exchange service can be provided. In fact, the foreign-exchange service provided by [Superior] was entirely consistent with its intrastate tariff that constitutes the applicable law for the issue, which was also reviewed and approved by the Board. Ex. 1389 (Sheet No. 26).

XIV. REGARDING THE UNNUMBERED CONCLUSION OF LAW

CL. The Board has jurisdiction of the intrastate claims in this matter pursuant to Iowa Code chapter 476.

The Board asserts that Iowa Code section 476.5 grants it authority to regulate Respondents' access rates. As a threshold matter, section 476.5 gives the Board authority only over the "terms and procedures under which toll communications shall be interchanged." Iowa Code Ann. § 476.11. Even if "rates" were subsumed within "terms and procedures," as the Board asserts (Final Order at 13), section 476.3 permits the Board to alter a carrier's rates only on a prospective basis. Iowa Code Ann. 476.3(3). On this basis alone, the Board has erred as a matter of law in ordering retroactive refunds.

The Board's analysis, however, entirely ignores its jurisdictional limitations over certain LECs, codified in section 476.1: "cooperative telephone corporations or associations [and] telephone companies having less than fifteen thousand customers and less than fifteen thousand access lines ... are not subject to the rate regulation provided for in this chapter." It is undisputed that Superior is a telephone cooperative and that Great Lakes has less than 15,000 customers and access lines. *See* Motion to Dismiss by Superior, Great Lakes, and Aventure at 3 (March 30, 2007). It is an elementary principle of statutory construction that the Board cannot use the general language of section 476.5 to defeat the specific circumscription of its authority over rate regulation contained in section 476.1. *See Telecomms. Research and Action Ctr. v. FCC*, 836 F.2d 1349, 1358 n.19, 1361 n.25 (D.C. Cir. 1988) (requiring agency to provide a "persuasive explanation of its departure" to justify violating the well-recognized principle of statutory construction that a specific statute will not be nullified by a general one).

The Board, however, relies solely on the dicta contained in *Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co.*, 165 N.W.2d 771, 775 (Iowa 1969), to overcome the clear language of section 476.1 and the cannons of statutory construction. Far from giving the Board carte blanche to regulate any carrier's "financial matters," (Final Order at 13), *Northwestern Bell* involved the Board's primacy over the courts in matters related to interconnection disputes. *Northwestern Bell*, 165 N.W.2d at 775. This decision only mentioned the Board's general jurisdiction over rate regulation in passing, and certainly did not give the Board license to ignore its statutory limitations. Thus, the Board has no jurisdiction over Applicants' access rates. But even if it did, the Board could only order prospective rate relief to the IXCs.

XV. <u>REGARDING ORDERING CLAUSE NO. 2</u>

OC 2. The Board directs the Respondents named in this complaint to refund the terminating switched access fees charges associated with the delivery of intrastate interexchange calls to numbers or destinations assigned to or associated with FCSCs and that were paid by QCC, Sprint, or AT&T. The Respondents are also directed to credit QCC, Sprint, and AT&T for any such charges that were billed but not paid.

The Board's Final Order "directs the Respondents named in this complaint to refund the terminating switched access fees charges associated with the delivery of intrastate interexchange calls to numbers or destinations assigned to or associated with FCSCS that were paid by QCC, Sprint, or AT&T." Final Order, Ordering Clause No. 2. The award of retroactive refunds is *ultra vires* and directly at odds with the Board's previous decisions.

First, the Final Order exceeds the Board's statutory authority to issue refunds. The Iowa Code specifically prohibits awarding retroactive refunds in cases such as this. Iowa Code § 476.3(3) provides that, "[a] determination of utility rates by the board pursuant to this section that is based on a departure from previously established regulatory principles shall apply prospectively from the date of the decision." In the Final Order the Board has established a rate of $0.00 for conference call traffic delivered to conference call service providers in Iowa. Here, because the Board has "depart[ed] from previously established regulatory principles," this newly established rate can only "apply prospectively from the date of the decision." *Id.* Accordingly, the award of retroactive refunds is unlawful. Similarly, the filed rate doctrine prohibits retroactive refunds in this matter, and by awarding damages without requiring the IXCs to refund the amounts paid by their customers for the calls at issue, the Board is sanctioning improper windfall profits for the IXCs.

Second, the Board's own precedent makes clear that no retroactive refunds can be awarded to telephone companies, such as the IXCs, for periods prior to when the telephone company first formally asserted that the charges are not subject to the tariff. Without explanation, however, the Final Order ignores the Board's prior precedent of limiting refunds in cases between two telephone companies. For example, in *Exchange of Transit Traffic*, the Board affirmed the Presiding Officer's Proposed Decision and Order refusing to award refunds for the period prior to the time the IXC first provided official notice that it believed the traffic that was being billed was not governed by the LECs' tariff. *See Exchange of Transit Traffic*, Order Affirming Proposed Decision and Order, SPU-00-7 (Mar. 18, 2002) at 16-18. Specifically, the

Board held that the "parties' actions demonstrate an agreement that the access charge tariffs were applicable up to a certain time, and that agreement should be enforced up to the moment that one of the parties (Qwest, in this case) unambiguously informed the other that the agreement was no longer in effect." *Id.* at 17. The Board held, therefore, "in a dispute between two telephone companies, each possessed of substantial subject matter expertise and a thorough understanding of the various circumstances applicable to the situation, it is more appropriate to enforce the parties' agreement regarding the applicable tariff (as evidenced by their actions), at least until one company has adequately notified the other that it no longer agrees regarding application of the tariff." *Id.* at 18. Accordingly, the Board's *Final Order* should, at a minimum, be clarified to establish that retroactive refunds are not available for traffic that was exchanged prior to notice from the IXCs contesting application of the tariff.

Finally, the record in this case shows that Great Lakes and Superior billed and collected only a minimal amount of access charges for intrastate traffic — the traffic that is within the jurisdiction of this Board. Great Lakes and Superior have been required to expend resources magnitudes higher in order to defend themselves in this case. Great Lakes and Superior will be required to expend even more resources to pursue an appeal of the Board's unsupportable legal and factual conclusions. Applicants therefore request the Board to reconsider the Final Order and dismiss the Complaint on the grounds that the amount at stake is not worthy of the effort required to pursue it.

XVI. <u>REGARDING ORDERING CLAUSE NO. 3</u>

OC 3. The Board directs QCC, Sprint, and AT&T to file their calculations of the amount of terminating switched access fees for the traffic at issue in this case and eligible for refund or credit within 30 days of the date of this order. QCC, Sprint, and AT&T are authorized to conduct additional discovery to make those calculations if necessary.

Having first decided to award retroactive refunds, the Board's Final Order goes on to direct "QCC, Sprint, and AT&T to file their calculations of the amount of terminating access fees for the traffic at issue in the case and eligible for refund or credit within 30 days of the date of this order." Final Order, Ordering Clause No. 3. The Board also reopens discovery for the limited purpose of allowing only the IXCs to "conduct additional discovery," if necessary. *Id.* This process is fundamentally flawed and a denial of due process. Moreover, as discussed above, *see* Section I.(c) *supra*, the Board failed to distinguish between intrastate and interstate tariffs.

Without explanation, the Board not only gives the IXCs another bite at the proverbial apple to argue their cases, but also creates a one-sided discovery process to reward them for their failure to adequately prepare their case in the first instance. Moreover, the Final Order enables the IXCs to submit new evidence, be it evidence they acquired from the LECs or evidence they and their expert witnesses manufacture in response to the Final Order. The Board's decision does not require or apparently even contemplate an opportunity for the LECs to be able to challenge the authenticity of the evidence or the conclusions drawn from the evidence. Instead, the Board seems poised to simply accept whatever number the IXCs present, without questioning the basis for the calculations or entertaining any objection whatsoever from the CLECs. Such a process clearly violates the LECs due process rights. *See, e.g.*, I.A.C. § 17A.12 ("Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved and to be represented by counsel at their own expense."); § 17A.14 ("Witnesses at the hearing, or persons whose testimony has been submitted in written form if available, shall be subject to cross-examination by any party as necessary for a full and true disclosure of the facts."). Accordingly, should the Board proceed with its stated intent to award retroactive refunds, it must set forth a clear, even-handed process that enables the LECs to examine and challenge any new evidence and those proffering these new calculations of damages.

In addition, the Board does not recognize a distinction between tariffs it can enforce and tariffs it cannot because it repeatedly fails to distinguish between the intrastate ITA Tariff and the interstate NECA tariff. The Board must make clear that only the intrastate tariffs of Respondents' are the subject of the dispute, and revise the Final Order as proposed by Great Lakes and Superior in footnote 3 above.

XVII. REGARDING ORDERING CLAUSE NO. 5

OC 5. The motion to stay proceedings filed in this docket on August 17, 2009, by Great Lakes and Superior is denied.

The Final Order conflicts with federal law on a topic where the FCC has occupied the field. The Board is aware that the FCC has initiated at least two proceedings to consider exactly the same issues as those in this case. Final Order at 76. One of them was opened pursuant a Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption filed at the FCC on August 14, 2009. On August 20, 2009, the FCC issued a Public Notice seeking comment on the Petition. *Comments Sought on Petition for Declaratory Ruling and Contingent Petition for Preemption of Great Lakes Communications Corp. and Superior Telephone Cooperative*, Public Notice, DA 09-1843, WC Dkt. No. 09-152 (Aug. 20, 2009). The issues in that case are "all matters relating to interstate access charges, including the rates therefor and revenue derived therefrom, are within [the Commission's] exclusive federal jurisdiction and thus any attempts by state authorities to regulate interstate access charges are beyond their authority." *Id.* Initial Comments were due September 21, 2009, and Reply Comments due October 6, 2009. Before that Public Notice, the FCC had initiated a separate proceeding to consider "allegations that substantial growth in terminating access traffic may be causing carriers' rates to become unjust and unreasonable because the increased demand is increasing carriers' rates of return to levels significantly higher than the maximum allowed rate." *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket 07-135, Notice of Proposed Rulemaking, FCC 07-176 (Oct. 2, 2007) at ¶ 1.

Under the Supremacy Clause, state law must yield to federal law when federal law occupies an entire field of regulation and has left no room for the State to supplement federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). It is clear that the FCC has occupied the field on this issue. To the extent the Board seeks to supplement any FCC rulings on the issue, it is free to do so, provided that such state supplemental rulings do not conflict with federal law. The Final Order conflicts with federal and must be dismissed.

XVIII. REGARDING UNUMBERED FINDING OF FACT, CONCLUSION OF LAW, AND ORDERING CLAUSE REGARDING GREAT LAKES CERTIFICATE

The Board found that Great Lakes was not certificated to provide service in the Spencer exchange, despite the record evidence clearly indicating that Great Lakes's consultant requested that Great Lakes being certificated in all Qwest exchanges in Iowa. Great Lakes/Superior Br. at 18-23; Great Lakes/Superior Reply Br. at 14-17; Exhibit 723. Indeed, Iowa Code § 476.29 states in relevant part that "[e]ach *certificate* shall define the service territory in which land-line local telephone service will be provided." Iowa Code § 476.29(4). (emphasis added). Great Lakes consultant attempted to comply with this exact provision, but was informed by IUB staff that an amendment to Great Lakes' certificate of public convenience was unnecessary. Exhibit 724. The Board now seeks to punish Great Lakes for its good faith attempt to comply with the certification requirements — and thereby reward Qwest and the IXCs with free access service — despite IUB staff informing Great Lakes' consultant compliance with section 476.29(4) was unnecessary.

What the Board does not address in the Final Order, however, is that Iowa Code § 476.29 has no sanction for noncompliance (or compliance with an IUB staff directive that misstates the law). It states that "[t]he certificate and tariffs approved by the board are the only authority required for the utility to furnish land-line telephone service." Iowa Code § 476.29(6). It does not, however, provide for a sanction if a carrier's certificate or tariff is in some way defective. Under section 476.29(9), "[a] certificate may, after notice and opportunity for hearing, be revoked by the board for failure of a utility to furnish reasonably adequate telephone service and facilities." Even if this provision were applicable to the present case, Great Lakes was never contacted by the Board or otherwise informed that its certificate and/or tariff were defective, let alone had its certificate revoked after a formal hearing as required by the statute. Tr. at 2483:14-19 (Nelson). Nor was Great Lakes's certification an issue raised in Qwest's complaint.

Courts addressing this issue have held that an agency's "non-action did not justify [the defendant's] refusal to pay the full tariff amount." *Norwest Transp., Inc. v. Horn's Poultry, Inc.*, 23 F.3d 1151, 1153 (7^{th} Cir. 1994). Rather, a governing body has the right to determine whether to seek a suspension or revocation of a tariff *after* a carrier fails to comply with the governing body's order to amend the tariff. *Id.* The failure of the governing body to institute administrative proceedings against a party because of its failure to amend its tariff left the previously filed tariff operative. *Id.* That is, a customer taking service under a tariff cannot avoid the tariff on technical grounds if there has not been a prior determination that a carrier's tariff is in some way defective and the carrier subsequently fails to correct it. *Id.*

The Board should not prohibit Great Lakes from collecting for services rendered, because to do so would impose a retroactive sanction unlawfully. Qwest cannot seek to avoid the payment of access charges based on Great Lakes' good faith attempt to comply with Iowa Code § 476.29. *Norwest Transp.*, 23 F.3d at 1153. Qwest was aware of the tariff that governed the services at the time they were rendered, and Great Lakes therefore has a right to collect its tariffed rates for those services. Qwest was in no way prejudiced by the fact that its customers' traffic was terminated in Spencer rather than in Lake Park or Milford: the terminating access rates would have been exactly the same for the three exchanges. Thus, the evidence demonstrates that Great Lakes sought to expand its certificate from the Board to include the Spencer exchange, indeed, all Qwest exchanges in Iowa. Further, there is no retroactive sanction contemplated in section 476.29 and the Board identified no authority in the Final Order that would permit such a sanction. The Board therefore should reconsider this finding.

CONCLUSION

For all these reasons, the Board should rehear and reconsider the Final Order, and conclude that the QCC Complaint should be dismissed.

September 25, 2009

Respectfully submitted,

Thomas G. Fisher Jr.
Parrish Kruidenier Dunn Boles Gribble
Parrish Gentry & Fisher, LLC
2910 Grand Avenue
Des Moines, IA 50312
515.284.5737
515.284.1704 fax

Ross A. Buntrock *
Stephanie A. Joyce *
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
202.775.5734
202.857.6000 fax

*Admitted *pro hac vice*

Counsel for Great Lakes Communication Corp.
and Superior Telephone Cooperative

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of September, 2009, served the foregoing **GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE APPLICATION FOR REHEARING** upon each of the following persons as required by the rules of the Iowa Utilities Board:

Anita Creps

Anita Creps

General Counsel
Iowa Utilities Board
350 Maple Street
Des Moines, IA 50319-0069

John R. Perkins, Consumer Advocate
Iowa Department of Justice
Consumer Advocate Division
310 Maple Street
Des Moines, IA 50319-0063

David S. Sather
davidsather@msn.com
George Baker Thomson, Jr.
george.thomson@qwest.com
Qwest Corporation
925 High Street 9 S 9
Des Moines, Iowa 50309

Robert F. Holz, Jr.
bobholz@davisbrownlaw.com
Steven L. Nelson
stevenelson@davisbrownlaw.com
Davis, Brown, Koehn, Shors & Roberts, P.C.
The Davis Brown Tower
215 – 10th Street, Suite 1300
Des Moines, IA 50309
Attorneys for the Farmers & Merchants Telephone Company of Wayland, Iowa; Dixon Telephone Company; The Farmers Telephone Company of Riceville, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company

Charles W. Steese csteese@s-elaw.com
Sandy Potter spotter@s-elaw.com
Steese & Evans, P.C.
6400 S. Fiddlers Green Circle
Suite 1820
Denver, Colorado 80111
Attorneys for Qwest Corporation

James U. Troup jtroup@venable.com
Tony S. Lee tslee@venable.com
Venable LLP
575 7th Street N.W.
Washington, D.C. 20004-1601
Attorneys for the Farmers & Merchants Telephone Company of Wayland, Iowa

Richard W. Lozier
rwlozier@belinlaw.com
Belin Lamson McCormick Zumbach Flynn
666 Walnut Street
Suite 2000
Des Moines, IA 50309-3989
Attorneys for AT&T Communications of the Midwest, Inc. and TCG Omaha

Lawrence P. McClellan
lmclellan@sullivan-ward.com
Sullivan & Ward, P.C.
6601 Westown Parkway
Suite 200
West Des Moines, Iowa 50266
Attorneys for Reasnor Telephone Company, LLC)

Bret A. Dublinske
bdublins@dickinsonlaw.com
Dickinson, Mackaman, Tyler & Hagen, P.C.
699 Walnut Street
Suite 1600
Des Moines, IA 50319-0063
Attorneys for Sprint Communications Company, L.P.

Thomas G. Fisher, Jr.
tfisher@parrishlaw.com
Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher L.L.P.
2910 Grand Avenue
Des Moines, IA 50312
Attorneys for Great Lakes Communications and Superior Telephone Cooperative

Paul D. Lundberg paull@terracentre.com
Lundberg Law Firm. P.L.C.
600 Fourth Street, Suite 906
Sioux City, IA 51101
Attorneys for Aventure Communication Technology, L.L.C.